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LIABILITY OF THE OWNER OF AN AUTOMOBILE FOR ITS NEGLIGENT USE BY A MEMBER OF HIS FAMILY.—The liability of an owner of an automobile, purchased for the pleasure and convenience of his family, for injuries resulting from the negligent use thereof by a single member of the family, with his consent and for such user's pleasure, has been in recent years both affirmed¹ and denied² in a large group of cases; and under precisely similar circumstances liability or non-liability has been posited on the existence or non-existence of the master and servant relation between the owner and the negligent user. There is substantial agreement among the courts that an automobile owner is not liable *per se*,³ that the mere relationship of parent and child⁴ or husband and wife⁵ does not impose liability, and that an automobile is not a dangerous instrumentality subjecting the owner to absolute liability.⁶ The courts holding the father or husband liable, however, predicate liability on a master-servant relationship. If the owner places his car and hired driver at the disposal of his family, he is liable for the driver's negligence while driving the family,⁷ and that the driver of the car carrying the family happens to be a member thereof, makes no difference.⁸ From this they reason that the fact that the son, daughter or wife is driving alone, does not alter the basis of liability; for such person in pursuing his or her own pleasure is said to be really doing the business of the owner, *i. e.*, affording pleasure to the family of which he is a member.

To make this the basis of a master and servant relationship is indeed a precarious ground for sustaining the father's or husband's liability. When a chauffeur takes the car out with the owner's permission, for

¹*Plasch v. Fass* (Minn. 1919) 174 N. W. 438 (wife); *Johnson v. Smith* (Minn. 1919) 173 N. W. 675 (minor son); *King v. Smythe* (1918) 140 Tenn. 217, 204 S. W. 296 (adult son supported by father); see *Birch v. Abercombie* (1913) 74 Wash. 486, 133 Pac. 1020 (daughter). In *Johnson v. Smith*, the son was carrying a guest of the father's, but the court did not base its decision on this fact.

²*Farthing v. Strouse* (1916) 172 App. Div. 523, 158 N. Y. Supp. 840 (wife); *Arkin v. Page* (Ill. 1919) 123 N. E. 30 (minor son); *Van Blaricom v. Dodgson* (1917) 220 N. Y. 111, 115 N. E. 443 (adult son); *Doran v. Thomsen* (1908) 76 N. J. L. 754, 71 Atl. 296 (daughter); *cf. Missel v. Hayes* (1914) 86 N. J. L. 348, 91 Atl. 322 (where son was driving the family).

³See *McNeal v. McKain* (1912) 33 Okla. 449, 126 Pac. 742; *Hutchins v. Haffner* (Colo. 1917) 167 Pac. 966.

⁴See *Griffin v. Russell* (1915) 144 Ga. 275, 87 S. E. 10.

⁵See *Hutchins v. Haffner*, *supra*, footnote 3. In general the common law liability of a husband for the torts of his wife has been abolished by statute.

⁶See *McNeal v. McKain*, *supra*, footnote 3.

⁷*McHarg v. Adt* (1914) 163 App. Div. 782, 149 N. Y. Supp. 244.

⁸*Missel v. Hayes*, *supra*, footnote 2; *Stowe v. Morris* (1912) 147 Ky. 386, 144 S. W. 52; *Smith v. Jordan* (1912) 211 Mass. 269, 97 N. E. 761. This situation must be studied carefully, for if the son is going out for his own pleasure or business and happens to give his mother or sister a "lift", then it may very well be that he is not the servant of the father. *Woods v. Clements* (1917) 113 Miss. 720, 74 So. 422.

his own pleasure, no liability is imposed on the owner,⁹ unless the chauffeur is a reckless or incompetent person. That the owner's object in letting his chauffeur use the car was to keep him satisfied and ultimately to get more efficient service out of him seems to be irrelevant.¹⁰ If such is the case, the son in driving for his own pleasure can no more be said to be in the service of his father. True enough in doing so he is fulfilling one of his father's purposes;¹¹ but it will not be urged that the son intent on his own enjoyment is regarding his indulgence in a "spin" as part of a serious performance of his father's business. If in the case of the chauffeur, where the personal satisfaction of the employee may mean greater efficiency in the master's service and the actual economic benefit to the master is real, it is held that he is not doing his master's work; surely in the case of the son, where the economic advantage to the father is speculative, we cannot argue that the son's pleasure was the father's business.

In a recent case, *Plasch v. Fass* (Minn. 1919) 174 N. W. 438, the defendant bought an automobile for the convenience and pleasure of his family, permitting his wife to use it at such times as she wished. While he was out of the state his wife, in using the car, negligently injured the plaintiff. In allowing recovery against the husband the court held that the wife, while driving the family car for her own pleasure, was a servant of the husband. In a similar case, *Arkin v. Page* (Ill. 1919) 123 N. E. 30, the Illinois court refused to hold the father liable for the negligence of his son while driving the family car alone, on the ground that no relation of master and servant existed. If the doctrine of agency urged in the first case is sound, *Arkin v. Page* points out that it ought to be equally applicable where the thing used is a bicycle, horse, gun, golf clubs, etc. Yet it is probable that the very courts in accord with the decision of *Plasch v. Fass*, would deny in these cases the existence of a master and servant relationship upon which to base liability.¹²

⁹*Gewanski v. Ellsworth* (1917) 166 Wis. 996, 164 N. W. 996; see *Reilly v. Connable* (1915) 214 N. Y. 586, 108 N. E. 853; *Brinkman v. Zuckerman* (1916) 192 Mich. 624, 159 N. W. 316. In a recent case, *Mogle v. A. W. Scott Co.* (Minn. 1919) 174 N. W. 832, the Minnesota court, though affirming the doctrine of *Plasch v. Fass*, refused to extend it to the case of a chauffeur using his master's car with the latter's permission, for his own pleasure. The court said: "The extension of the family automobile doctrine to other relationships cannot well be justified upon any principle of the law of master and servant, or principal and agent. The owner of an automobile, who loans it to another to use for purposes personal to the borrower, is neither master nor principal, but merely a bailor, and in law is not chargeable with the consequences of the borrower's negligence while pursuing his own ends in his own way."

¹⁰See *Gewanski v. Ellsworth*, *supra*, footnote 9.

¹¹The purpose of the owner in buying a car is irrelevant. See *Hays v. Hogan* (1917) 273 Mo. 1, 200 S. W. 286, reversing (1914) 180 Mo. App. 237, 165 S. W. 1125.

¹²*King v. Smythe*, *supra*, footnote 1, though holding the father liable in the case of an automobile, admits that he would not be liable in the case of the golf sticks and suggests that an automobile is not comparable to the other articles. The New York court, in absolving the father from liability, saw no distinction between automobiles and other articles in denying a master-servant relationship. "We have never heard it argued that a man who kept for family use a horse or wagon or boat or set of golf

The courts in accord with *Plasch v. Fass* seem to consider interesting but irrelevant elements in the process of finding the relationship upon which to posit liability. One speaks of not being bound by an esoteric theory of agency;¹³ another frankly admits that we ought to extend our notions of agency;¹⁴ and they all seem to talk of a failure of justice if the owner is not held answerable.¹⁵ The constant reiteration of vehement denials that an automobile is a dangerous instrument, though admittedly more dangerous than golf clubs, or that the relationship of parent-child or husband-wife is the basis of liability, and of assertions that if liability is not imposed there would be a failure of justice, leads one to believe that these have been real factors in influencing the courts' psychology in making a distinction between a chauffeur and a child or wife, and in holding that the owner ought to be liable. In an endeavor to rationalize that feeling, the courts have expanded the doctrine of master and servant in one group of cases, to wit, those involving automobiles.

The parent's or husband's liability may be sustained on the sociological or economic theory underlying vicarious liability; and it seems that the courts in discussing the social and economic effect of a refusal to hold the owner liable have admitted indirectly that these elements have influenced them in declaring a master and servant relationship. The father has control of the car and can prescribe the conditions of its use. An automobile is regarded as more dangerous than a horse or the other articles previously suggested. The members of the family are generally financial dependents;¹⁶ whereas in the case of lending a car the borrower is more apt to be financially responsible.¹⁷ And perhaps the fact that the automobile owner can insure against accidents more conveniently than the entire community and that the cost of insurance should be reckoned as part of the cost of operating the car has subtly induced the courts to draw this distinction.

sticks had so embarked upon the occupation and business of furnishing pleasure to the members of his family, that if sometime he permitted one of them to use one of those articles for his personal enjoyment, the latter was engaged in carrying out not his own purposes, but, as agent, the business of his father." *Van Blaricom v. Dodgson*, *supra*, footnote 2, at p. 215. It is interesting to note that liability of a father has been denied in the case of a horse driven by his son, *Maddox v. Brown* (1880) 71 Me. 432, but the question of liability in the case of an automobile does not seem to have arisen in that jurisdiction.

¹³*King v. Smythe*, *supra*, footnote 1.

¹⁴"The adoption of a doctrine so callously technical would be little short of calamitous." *Birch v. Abercombe*, *supra*, footnote 1, at p. 496.

¹⁵*King v. Smythe*, *supra*, footnote 1, is a typical example.

¹⁶"The one who provides an automobile for the pleasure and indiscriminate use of the younger members of his family should not be lightly absolved from responsibility." *Johnson v. Smith*, *supra*, footnote 1, at p. 677.

¹⁷*Cf. King v. Smythe*, *supra*, footnote 1.